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IN THE

Supreme Court of the United States

LARRY G. MASSANARI,
ACTING COMMISSIONER OF SOCIAL SECURITY
Petitioner,

v.

SIGMON COAL COMPANY, INC. AND
JERICOL MINING, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* R.G. JOHNSON COMPANY, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* R.G. JOHNSON COMPANY, INC.

This brief *amicus curiae* is filed in support of the Respondents, Sigmon Coal Company, Inc., *et al.*[1] R.G. Johnson Company, Inc., is a party to the primary case cited by the government as creating the split in the circuits on the issue presented here. *R.G. Johnson Company, Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999). R.G. Johnson believes that the opposing point of view from *R.G. Johnson* should be available for the Court's use as it considers the government's position. The Court should not be limited to what the government has chosen to bring to the Court's attention, as supplemented by the trustees of the United Mine Workers of America Combined Benefit Fund.[2]

R.G. Johnson also has a direct interest in the outcome of the Sigmon case now before the Court. The court of appeals in *R.G. Johnson* remanded the case to the district court where it is still pending. The Court's decision in Sigmon's case could affect, if not control, the issues which are the subject of the ongoing district court proceedings in R.G. Johnson's case. Because of the potential consequences, R.G. Johnson urges the Court to consider the additional background material and arguments, including a summary of relevant events ignored by the government, set forth below.

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[1] This brief is filed concurrently with the written consents of the parties. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

[2] The trustees of the Combined Fund, appearing as *amicus curiae* in support of the government in this case, were defendant-appellants in *R.G Johnson*.

STATEMENT OF THE CASE

The government has framed the issued in the case before the Court as whether the Coal Industry Retiree Health Benefit Act of 1992 permits the Commissioner of Social Security to assign beneficiaries to the successor in interest of a signatory operator that is no longer in business. As discussed more fully below, the same issue arises in R.G. Johnson's case. The government assigned beneficiaries (retirees and their dependents) to R.G. Johnson based the retirees' one-time employment by another company which was found to be no longer in business for Coal Act purposes. While the government did not consistently represent the basis for the assignment at various stages of the process for making and reviewing assignments, it eventually settled on the "successor in interest to the signatory operator" theory. R.G. Johnson's case therefore presents a comparable case for the Court's consideration.

A. The government's assignments to R.G. Johnson

R.G. Johnson was first notified of its potential liability under the Coal Act in 1995. The government sent form letters to R.G. Johnson informing it of the assignment of 15 beneficiaries based on the retiree-beneficiaries' former employment by a different company with a similar name, "The R.G. Johnson Company." The old company had itself been assigned the beneficiaries in question in 1993, but the government had overturned those assignments apparently because the old company, while still in existence, was found to be no longer in business.[3]

R.G. Johnson is a closely-held Pennsylvania company incorporated in 1988. As of 1988, the old company, a

[3] The general background of R.G. Johnson's case is set forth in the district court's decision , *R.G. Johnson v. Apfel*, 994 F.Supp. 10 (D.D.C. 1998), and the court of appeals' decision setting aside the district court's decision, 172 F.3d 890.

Delaware corporation, had been in the business of performing shaft and slope construction for coal company customers for many years. It had been signatory to collective bargaining agreements with the United Mine Workers of America covering construction work and had been a member of the Association of Bituminous Contractors, Inc., a multiemployer bargaining association whose members are construction contractors.[4]

In April 1988, R.G. Johnson purchased the operating assets and certain real estate from the old company. It embarked on the business of shaft and slope construction under wholly new ownership. While R.G. Johnson employed many individuals who were formerly employed by the old company, it never employed the retirees who were subsequently assigned to it by the government.

In response to the government's notices, R.G. Johnson denied that it was properly liable for the individuals it had been assigned. Eventually, the government affirmed the assignments by way of summary dispositions that never fully explained the government's rationale. The government alternately claimed that R.G. Johnson was a "related person" to the old company, or that it was a "successor" to the old company. R.G. Johnson then brought suit in federal court against both the government, who made the assignments, and the Combined Fund, which collects premium payments based on the number of beneficiaries assigned by the government.

The district court granted summary judgment in R.G. Johnson's favor. The district court agreed with R.G. Johnson that the definition of "related person" does not include a successor in interest to a signatory operator and that the legislative history offers no basis for rejecting the plain meaning of the statute.

[4] ABC's history of collective bargaining with the UMWA and its experience under the Coal Act is recounted in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998).

B. The court of appeals' decision in *R.G. Johnson* and the nature of the split in the circuits

On appeal, the District of Columbia Circuit agreed with both of the district court's conclusions on what the statute, as written, says. That is, it does not support the government's position either on its face or in light of its legislative history. Nevertheless, the panel majority (Circuit Judge Williams and Senior Circuit Judge Buckley) ultimately ruled against R.G. Johnson on the statutory interpretation issue, finding that this was one of those rare cases in which the plain language of a statute could be ignored because a literal application of the statute's provisions would produce a result at odds with its drafters' intentions. In dissent, Circuit Judge Randolph explained why construing the statute as written does not render it inscrutable and why the majority's alternative approach is problematic.

Consistent with the District of Columbia Circuit's decision, the Fourth Circuit in the case now before the Court similarly rejected any claim of literal statutory support for the government's position. Where the Fourth Circuit majority split with the District of Columbia Circuit majority was on the question of whether there was any justification for refusing to apply the statute as written. On that particular point, the Fourth Circuit majority agreed with Circuit Judge Randolph's conclusion and refused to depart from the plain language of the statute. Circuit Judge Murnaghan, in dissent, would have followed the majority opinion in *R.G. Johnson*.

In *Eastern Enterprises v. Chater*, 110 F.3d 150, 154-55 (1st Cir. 1997), reversed on other grounds, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the First Circuit had previously reached the same conclusion as the Fourth Circuit. The Eastern Enterprises case is noteworthy because the government there argued successfully in favor of the position which it is now asking this Court to reject. Specifically, the government endorsed an interpretation of the statute which is

consistent with the position taken by R.G. Johnson and respondents in the case now before this Court.[5] The government's current brief to the Court provides no explanation for the government's change of course since its victory before the First Circuit in *Eastern Enterprises v. Chater*.[6]

In an unpublished decision, the Third Circuit relied on the majority opinion in *R.G. Johnson* to find in the government's favor. *Aloe Energy Corp. v. Apfel*, No. 99-3915 (June 20, 2000), petition for cert. pending, No. 00-725. The Third Circuit's decision indicates an acceptance of both holdings from *R.G. Johnson*, namely that the plain meaning of the statute does not support the government but that this is an exceptional case in which the government nonetheless prevails. As this summary of the circuit court decisions suggests, the split in the circuits on the issue currently before the Court rests in large part on the parsing of historical events. The government's current position is that Congressional intent to sanction the assessment of liability against the "successor in interest to the signatory operator" can be gleaned from this history. The court of appeals below found no justification for this type of successor liability. In order to present the Court with a full picture of these historical events, a summary of the legislative proposals which preceded the Coal Act are described below.

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[5] The pertinent parts of the government's brief at the district court level in the Eastern Enterprises case were included in the R.G. Johnson record and are attached to this brief at 1a-8a.

[6] In its petition for a writ of certiorari to the Court in this case, the government made the misleading statement that the First Circuit "rejected the Commissioner's position." Pet. at 13. To the contrary, the First Circuit, in a unanimous decision, accepted what was then the government's position. The First Circuit had no opportunity to consider what is now the government's stated position.

C. The legislative setting for enactment of the Coal Act.

The Coal Act represents a legislative response to what Congress found to be a crisis in the previously private mechanism for funding the health care of retired coal miners represented by the United Mine Workers of America and their dependents. Solutions to the underlying problem of funding retiree benefits were attempted in the context of collective bargaining beginning in 1974, but the problem defied conclusive resolution and caused recurring strife in the 1970's and 1980's. The Court recounted this history in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), *supra*.

The first legislative solution was proposed in 1989. This proposal was entitled the "Coal Industry Health Benefit Stabilization Act of 1989." S.1708, 101st Cong., 1st Sess. It would have imposed withdrawal liability in the context of medical benefit plans, *i.e.* it would have required employers who ceased to contribute to the plans to pay a proportionate share of the benefit plan's calculated future liability. This approach was patterned on the well-known pension plan withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980. *See* 135 Cong. Rec. S12312 (October 2, 1989).

The Stabilization Act enjoyed joint labor-management support by the UMWA and certain large coal producing companies whose employees were represented by the UMWA. Because of this initial show of support, the Senate Finance Committee which undertook consideration of this proposal in connection with the Budget Reconciliation Act was apparently unaware that there would be any significant opposition to the substance of the proposal. Once the proposal became widely known, however, opposition arose. The apparent lack of a deliberative process fueled additional opposition to the 1989 proposal, and it was withdrawn from the budget process.

In light of this experience, supporters of a legislative response took steps to improve the public perception of the

process and the consideration of alternative solutions. In 1990, then Secretary of Labor Elizabeth Dole announced the creation of the Advisory Commission on United Mine Workers of America Retiree Health Benefits, the so-called Coal Commission. The Chairman of the Coal Commission was former Secretary of Labor William J. Usery and the Vice Chairman was law professor law Henry H. Perritt, Jr. The members of the Coal Commissioner included the president of the UMWA, representatives from three companies engaged in coal mining (Bethlehem Steel Corporation, Pittsburg and Midway Coal Mining Company and Peabody Coal Company) and representatives of organizations in the health and actuarial fields.

The three coal mining companies with members on the Coal Commission were all parties to collective bargaining with the UMWA. There were no representatives from non-union coal mining companies or from companies who had once had some historical connection to the UMWA but no longer did. There were also no representatives from the construction industry.[7]

The Coal Commission gathered information from a number of sources and issued a report on November 5, 1990.[8] While, as expected, the report contained a number of recommendations, it did not include a consensus on the appropriate financial solution. A majority of the Coal Commission endorsed an industry-wide tax on coal while the dissenting members of the Coal Commission argued that the problem was created by the limited UMWA-represented segment of the industry and a solution should similarly be limited to this segment.

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[7] While it is perhaps obvious, for the record it should be noted that R.G. Johnson was not a party to the Coal Commission's proceedings.

[8] According to the brief filed by the trustees of the Combined Fund, a copy of the Coal Commission report has been lodged with the Court. Brief of the Trustees as *Amici Curiae* at 3, n.4.

The absence of majority support for an industry-wide tax is particularly striking since the Commission did not include representatives from the non-UMWA represented segment of the industry. Former signatories to UMWA agreements, as well as the non-union coal producers, had the opportunity to appear and submit statements prior to the issuance of the Coal Commission's report, *see* report at 117 and 119 (Appendix 8 and Appendix 9), but had no opportunity to review or comment on the recommendations contained in the report in advance of its issuance.[9] Thus, parties who were likely to have the strongest objection to legislative action patterned on the majority's recommendation had no voice in preparing the report. Even so, the Commission still could not garner unanimous support for its industry-wide approach. The Coal Commission's recommendations would likely have been different if all of the potentially affected parties had had a voice on the Commission itself.

Following issuance of the Coal Commission's report, hearings were held by the Senate Finance Committee's Subcommittee on Medicare and Long-Term Care in 1991.[10] In November 1991, a new legislative proposal was introduced, entitled the "Coal Industry Retiree Health Benefit Act of 1991." S.1989, 102nd Cong., 1st Sess. This proposal would have created a "Coal Industry Retiree Health Benefit Corporation," whose five-member board of directors was to consist of private parties chosen from labor and management and appointed by the Secretary of Labor. This corporation would have been responsible for collecting "premium" payments imposed on coal tonnage and employee hours in addition to per beneficiary "premiums" assessed against the beneficiary's former employer or last signatory operator. *See* 137 Cong.Rec. S17061 (Nov. 19, 1991).

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[9] Also excluded were parties, such as R.G. Johnson, who were unaware that the Commission might make a recommendation that would not be construed as affecting them until some distant point in the future.

[10] Again, R.G. Johnson was not a party to these proceedings.

Despite the careful choice of terminology avoiding use of the word "tax," this legislation was nonetheless viewed as imposing a tax on coal production. In March of 1992, a revised version of the bill, which was still based on the tax approach and given the updated title, "Coal Industry Retiree Health Benefit Act of 1992," was introduced. *See* 138 Cong. Rec. S3433 (March 12, 1992). It was included in the "Tax Fairness and Economic Growth Act of 1992," which was vetoed by then President George Bush on March 20, 1992.

The version of the "Coal Industry Retiree Health Benefit Act of 1992" which eventually became law was introduced by Senator Rockefeller on July 29, 1992. It was significantly unlike its similarly named predecessors in several respects. It did not include any type of direct tax on coal production or hours worked in the industry. Rather, it incorporated features from the competing proposals which had anticipated transfers of funds from the Abandoned Mine Lands Trust Fund and from the UMWA 1950 Pension Fund.[11] Most significantly, it contained a wholly new funding feature which had not previously appeared in any of the legislative proposals dating from 1989, 1991, or earlier in 1992, namely, the creation of a private body, the Combined Benefit Fund, which would be run by private individuals but whose beneficiaries would be assigned to former employers by a governmental body.[12]

The version of the legislation under consideration in July 1992 was the first instance which included a proposal for the

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[11] On February 27, 1992, Representative Rahall had introduced H.R. 4344, which proposed a transfer of AML Funds to the government-sponsored corporation created by the 1991 version of the Coal Industry Retiree Health Benefit Act., S1989. It was intended to supplement the latter Senate bill. On April 8, 1992, Senator Boren had introduced a bill that would have transferred excess pension funds from the 1950 Pension Fund to the 1950 and 1974 Benefit Funds. S2550, 102nd Cong. 2nd Sess.

[12] Originally, the legislative record referred to the Department of Health and Human Services, but these duties are now with the Commissioner of Social Security. *See* Brief for the Petitioner at 6, n.4.

government to play any role in the assessment of liability against former employers. None of the prior proposals had anticipated the government generally, or the Social Security Administration in particular, taking an active part in identifying liable parties or otherwise administering a program of retiree benefits for UMWA retirees and their dependents.

D. The July 27, 1992 Senate Legislative Counsel Draft of the Coal Act

While the above is a summary of legislative proposals that were introduced in Congress, there was significant behind-the-scenes activity before the emergence of the July 29, 1992 version of the legislation. During the week of July 20th, the White House had "jumped into talks" with key senators, focusing efforts on non-tax alternatives such as tapping the mine workers' over-supplied pension fund and setting up a system for assigning retired miners to companies linked to their original employers. Holly Idelson, *Bill to Set National Policy Remains Blocked Over Coal-Tax Provision*, 50 Cong. Q. Wkly. Rep. 2166 (July 25, 1992). On July 23, 1992, Senator Rockefeller held an afternoon news conference with the president of the UMWA to announce that the sides were "very close." *Id.* Negotiators worked through the weekend (July 25th and 26th) to reach an accord on the coal issue, and by July 28, 1992 were confident that a deal was set. Holly Idelson, *Bills to Cut Oil Dependence Finally Head to Conference*, 50 Cong. Q. Wkly. Rep. 2261 (August 1, 1992).

On Monday, July 27, 1992, two days before the version of the Coal Act which eventually became law was introduced, a draft proposal prepared by the Senate Legislative Counsel was circulating which is noteworthy by comparison to the Coal Act itself. This draft, taken from the record of the R.G. Johnson case, is attached to this brief at 10a-39a.

First, the Senate Leg. Counsel draft included a section setting forth "Findings and Declaration of Policy." Two findings were identical to those included with the Coal Act:

That the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest (finding (1) in both) and that, in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees (finding (1) in the Senate Leg. Counsel draft and finding (4) in the Coal Act). The Statement of Policy was also identical: To remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry; to allow for sufficient operating assets for such plans; and to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans. Appendix at 10a; 26 U.S.C. § 9701 (Historical and Statutory Notes).

The difference between the two is that the Senate Leg. Counsel draft included two other findings which did not accompany the later Coal Act: That an important element in the privately maintained benefit plans now experiencing financial difficulty has been the provision of health benefits for retirees of companies no longer contributing to the coal retiree health funds; and that withdrawals of contributing employers from privately maintained benefit plans maintained under collective bargaining agreements and covering retirees in the coal industry have resulted in substantially increasing funding burdens for employers that continue to contribute to such plans, adversely affecting the stability of labor-management relations in the coal industry.

Turning to the statutory provisions themselves, the Senate Leg. Counsel draft included identical definitions of general applicability (Section 9701) for plans and funds, agreements, and terms relating to operators, with the following significant exceptions.

First, the Senate Leg. Counsel draft defined a signatory operator in Section 9701(c)(1)(A) to mean a person which is or was a signatory to a coal wage agreement (the same as Coal Act Section 9701(c)(1)), or:

> (B) in the event a person described in subparagraph (A)is no longer in business, any successor to such person.

Appendix 13a. Next, while the "related person" definition was structured the same as the ultimate Coal Act provision (with three related person categories and an unnumbered catch-all provision at the end), the draft's category (iii) was different than the joint venture interest included in the Coal Act. The Senate Leg. Counsel draft instead referred to the Secretary of Health and Human Services[13] identifying any other person having an ownership or profit-sharing interest with a signatory operator in a business within the coal industry. *Id.* The catch-all provision was also different, in that it provided that "A related person shall also include a *successor* of any person described in clause (i), (ii), or (iii)." Appendix 15a (emphasis added). This is as opposed to a "successor in interest," the phrase used in the Coal Act.

Finally, the Senate Leg. Counsel draft included a specific definition of "successor," specifying that the term has the meaning given it under the National Labor Relations Act. Appendix 16a. There is no comparable definition of either "successor" or "successor in interest" in the Coal Act.

It is also noteworthy, that despite the specific provisions addressing signatory operator successor liability and defining what it means to be a successor, the catch-all provision in the "related person" definition was structured the same as the definition included in the Coal Act, *i.e.* with a reference to any person "described in clause (i), (ii) or (iii)." Appendix 15a.

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[13] As noted earlier, the role initially played by HHS now rests with Social Security.

The next statutory provisions establishing the Combined Fund (Section 9702), addressing plan benefits (Section 9703), setting forth the liability of assigned operators (Section 9704) and providing for transfer of assets from the 1950 Pension Plan and the AML fund (Section 9705) are the same in the Senate Leg. Counsel draft and the Coal Act. Section 9706, the provision under which the government assigns beneficiaries, is also identical in most respects, but differs from the Coal Act in certain respects which are pertinent here.

First, Section 9706(a) of the Senate Leg. Counsel draft directed the government to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which is in business" in a specified order. Appendix 30a. The Coal Act provision 9706(a) is the same, except that it includes the parenthetical "(or any related person with respect to which)" after the phrase signatory operator.[14]

Next, unlike Section 9706(b) of the Coal Act, which concerns "Rules relating to employment *and reassignment upon purchase*" (emphasis added), the Senate Leg. Draft did not include a provision addressing post-enactment successorship. Coal Act Section 9706(b)(2), however, specifically addresses the optional transfer by an assigned operator to a post-enactment successor, and, notably, not a "successor in interest."

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[14] The third assignment category, which the Court held unconstitutional in *Eastern Enterprises*, was also phrased differently, referring to the signatory operator who employed the retiree for a longer period of time than any other signatory operator "during all periods before 1978." Appendix 30a. The Coal Act instead includes the phrase "prior to the effective date of the 1978 coal wage agreement." 26 U.S.C. § 9706(a)(3).

E. The passage of the Coal Act

The July 29, 1992 proposal subsequently was enacted as part of the Energy Policy Act of 1992, signed into law on October 24, 1992 without any change. No hearings were held on any of the July 29, 1992 provisions before the Coal Act became law. Whatever had occurred during the behind-the-scenes negotiations involving key senators and the White House in July 1992 established what would be the final statutory scheme.

The conference report associated with the Energy Policy Act contains no explanation of what was meant by any particular provision of the Coal Act.[15] The isolated statements which were entered into the Congressional Record concerning the Coal Act in October 1992 were not a part of the actual Energy Policy Act conference report, although various parties have been confused by the heading "Conference Report" that was associated with the "technical explanation" offered by Senator Wallop. *See* 138 Cong. Rec. S17604 (October 8, 1992). Despite this title, there is nothing in any of the legislative materials to indicate the status of this "technical explanation" is anything other than a statement entered into the record at the request of a member of Congress.

SUMMARY OF ARGUMENT

The plain language of a statute notifies affected parties of both their rights and obligations. When interpreting the Coal Act, Respondent Jericol Mining, like R.G. Johnson, reasonably relied on the statute as written to support its refusal to take on the liability which the government now seeks to impose. The reasonableness of this view was enforced by the government's own actions. No notice was given that assignments would be made on the basis of a "successor in interest to a signatory operator" theory, and the

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[15] Attached at Appendix 40a-48a is the relevant portion of this conference report, similarly taken from the record in *R.G. Johnson*.

government was, in fact, was promoting the position of no such liability in 1995.

Without explaining the change in its position since it advocated a different view in *Eastern Enterprises*, the government now finds that Congress, by way of a tortured construction of a single provision of the Coal Act that ignores all others, meant Combined Fund liability to flow to a direct "successor in interest to a signatory operator." Absent any direct support in the Coal Act or otherwise, the government relies on legislative materials of dubious authority to provide an aura of respectability for this claim. The government asks the Court to look to this legislative gloss as being the end of the matter.

Even assuming that the Court were willing to embark on the course of statutory construction presently favored by the government, the government has failed to present anything but manifestly ambiguous support for its current views. Other sources belie the government's claim that Congress used a bizarre statutory construction to achieve what could have been done quite simply, if that is what Congress meant to do. Congress knew how to create the type of successor liability at issue here, and intentionally omitted it from the Coal Act. The government is attempting to create support where there is none.

The Fourth Circuit correctly concluded that the Respondents Sigmon, *et al.*, are not liable under the Coal Act. This is what Congress both said and meant. The court of appeals' decision should be affirmed.

ARGUMENT

The essence of the government's position is that affected parties who rely on the plain language of a statute as the statement of the law, consistent with the normal rules of statutory interpretation, do so at their peril. Under the government's approach, the government can, at any point, reverse course and embrace a new, previously unannounced

view of what seemed a settled interpretation of the statute. Both the district court and the court of appeals in the case now before the Court refused to accept that this is the way statutory obligations are to be imposed. Instead, they relied on the plain language of the Coal Act and applied it as written. This Court is urged to affirm that this is what Congress intended.

I. The government's new textual argument in support of its "successor in interest to a signatory operator" theory should be rejected as a proper basis for imposing liability under the Coal Act.

The lower courts have consistently rejected any contention that a literal interpretation of the statute leads to the liability of parties who have been identified by the government as "successors in interest to signatory operators." The courts found that the relevant definitions of "signatory operator" and "related person," 26 U.S.C. § 9701(c)(1) and (2), simply do not support this claim. The district court in R.G. Johnson's case, for example, characterized the argument in favor of literal statutory support as "entirely illogical" and based on a "tortured" reading of the "related person" definition. 994 F.Supp. at 14.

Even supposing that the government's current "plain meaning" textual argument has any viability, there can be no dispute that the government's interpretation is, by far, less plain than the more straightforward reading to the contrary adopted both by parties such as Jericol Mining and R.G. Johnson and all of the courts below. It requires three pages of exposition in the government's brief to reveal how the definition of "related person" encompasses a direct successor in interest to a signatory operator. Brief for the Petitioner at 23-26. The magnitude of this exercise alone demonstrates why affected parties might not have interpreted the statute in the way the government now favors. Given the additional fact that the textual basis for the government's view is convoluted, at best, it is entirely understandable that a potential "successor in interest to a signatory operator" would

conclude upon reading the statute that it was not covered by the plain language of the Coal Act. Nor would such parties have any cause to question their straightforward reading of the statute. Even assuming that potentially affected parties were privy to the essentially non-public developments behind the statute, and parties such as R.G. Johnson were not, they still had no reason to suspect that their reading of the statute was in error. Nothing in the Coal Commission's proceedings or the prior legislative proposals indicated that successorship liability of the sort at issue here was a possibility. The legislative proposals which preceded the Coal Act were based on completely different concepts – either continued payments to the then-existing UMWA Health and Retirement Funds or a tax on coal production – and did not anticipate the assigned operator approach to funding benefits that became the Coal Act.

Once the assignment system was in place, there was still no notice that this type of liability was in the offing. In the course of making assignments, the government never provided any notice (actual, constructive or otherwise) to R.G. Johnson or any other purported "successor in interest to a signatory operator" of potential liability. In fact, the position the government was taking before the district court in the Eastern Enterprises case as of April 1995 was to the contrary. There, the government explained the statutory basis for excluding successor liability as follows:

> Inclusion of successors in those provisions relating to related persons (§ 9701(c)(2)(A)) and reassignments upon purchase (§ 9706(b)(2)) clearly establishes both a Congressional awareness of successor company issues in the coal industry and a proficiency in expressly addressing such issues where deemed appropriate or necessary. Congress, therefore, must be presumed to have acted purposefully and intentionally when omitting successor language from the requirements of the

Coal Act's assignment hierarchy and definitional section for signatory operators.

Appendix at 4a. Consistent with the government's own position, parties such as Jericol and R.G. Johnson properly concluded that they are not covered by the language of the statute.

The government did not arrive at its "successor in interest to a signatory operator" theory until some time after endorsing a contrary view in *Eastern Enterprises*. The government has never explained why it eventually changed course and arrived at its current position. Imposing liability on affected parties under these circumstances is unjustifiable.

II. The omission of the type of successor liability at issue in this case from the Coal Act was intentional.

While the equities favor rejection of the government's position, this is not the only flaw in the government's argument. The government's legal analysis rests on the claim that Congress either intended to include successor liability of the type at issue here or that it was a mistaken omission. However, the gloss which the government seeks to place on the indicia of Congressional intent should be rejected for the after-the-fact makeweight that it is. The exclusion of the type of successor liability at issue in this case was entirely intentional.

The government itself argued in the Eastern Enterprises case that Congress was aware of successor liability and chose to exclude it from both the definitional sections and the assignment sections of the Coal Act. To the extent that the government now seeks to look to legislative materials to justify a change of position, there is no reason to limit the search to the materials which the government cites.

Other sources belie the claim that Congress did not mean to exclude liability for a successor in interest to a signatory operator.

As discussed above, the critical events leading to passage of the Coal Act in its final form occurred in July 1992. As of July 27, 1992, the members of Congress who were actively involved in drafting the specific provisions which would become law were considering the Senate Leg. Counsel draft.[16] That draft precisely addressed signatory operator successorship by defining a signatory operator to include a direct successor. If this provision had been carried over into the Coal Act, there would have been no need to parse the "related person" definition to discover direct successor liability as the government now maintains. It would have been there by way of the definition of signatory operator.

This provision, along with the definition of "successor," was deleted before the July 29, 1992 version of the statute was introduced. Given the timeframe and the similarities between the Senate Leg. Counsel draft and the Coal Act, it is apparent that this was a deliberate deletion. Both the statement of policy and the vast majority of the language found in the Senate Leg. Counsel draft was carried over into the Coal Act. These limited provisions were not.

If nothing else, the inclusion and then subsequent exclusion of the successor provisions proves that Congress was aware of successor liability and knew how to include it by way of a simple statutory construction if it so chose. It did not so choose. The government's underlying premise that Congress could not have intended to exclude signatory operator successor liability is mistaken.

While there is no official record of the deliberations behind the exclusion, it is entirely reasonable to conclude that the desired result was the most obvious one – to delete signatory operator successor liability. At the same time that

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[16] The version of the statute which became law was a creation of the Senate. No changes were made during the subsequent conference with the House of Representatives. Accordingly, the critical parties were the involved members of the Senate.

the definitional successor provisions were deleted from the Senate Leg. Counsel draft, a new provision addressing post-enactment successorship was inserted. 26 U.S.C. § 9706(b)(2). Significantly, this provision left ultimate liability with the signatory, not its successor. Such a concept would have been at odds with a rule mandating successor liability coextensive with signatory liability.

It is also significant that the structure of the "related person" definition remained the same. If Congress had believed that the "related person" definition already included some aspect of signatory operator successorship liability, this would have been changed as well. The absence of a comparable change means that signatory operator successor liability was not there in the first place.

The July 1992 development of the Coal Act establishes that it was a carefully crafted compromise between competing interests. This compromise should be respected notwithstanding the government's current position. The Fourth Circuit correctly rejected the government's claims in favor of what the statute says and Congress intended.

CONCLUSION

For the reasons stated above, R.G. Johnson urges the Court to affirm the decision below.

Respectfully submitted,

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R.G. Johnson Company, Inc.

Dated: July 24, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

EASTERN ENTERPRISES,

Plaintiff, Case No. 93-12372WF

v.

SHIRLEY S. CHATER,
Commissioner of Social Security, et. al.,

Defendants.[1]

FEDERAL DEFENDANT'S OPPOSITION TO EASTERN ENTERPRISES' MOTION FOR SUMMARY JUDGMENT ON STATUTORY INTERPRETATION CLAIMS

PRELIMINARY STATEMENT

Eastern Enterprises ("Eastern") asserts in its motion for summary judgment on statutory interpretation claims that federal defendant Secretary of Health and Human Services ("Secretary") improperly assigned beneficiaries to Eastern

[1] Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, the function of the Secretary of Health and Human Services in Social Security and related cases was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with Fed. R. Civ. P. 25(d) and § 106(d) of Pub. L. No. 103-296, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services. Since plaintiff Eastern Enterprises' summary judgment memorandum (as well the parties' other submissions to date in this case) refer to the Secretary, rather than the Commissioner, as the party-federal defendant, the text of this memorandum for ease of reference will continue to refer to the federal defendant as "the Secretary."

under the Coal Industry Retiree Health Benefit Act of 1992 (codified at 26 U.S.C. §§ 9701-9722) ("Coal Act"). In summary, Eastern contends that the Social Security Administration ("SSA") improperly assigned beneficiaries to Eastern as a result of the agency's interpretation of the Coal Act which provides for beneficiary assignments to successor companies only when no other otherwise assignable company remains in business. Eastern asserts that

* * * * *

predecessor signatory operator. *Id.*

Eastern's proffered view of successor assignments not only ignores the carefully-wrought legislative balance underlying the Coal Act's assignment provision, *see* discussion *infra* pp. 28-34, but also conflicts with the well-established principle of statutory construction holding that the plain language of a statute, absent extraordinary circumstances, is conclusive. *See, e.g. Negonsott v. Samuels*, -- U.S.--, 113 S. Ct. 1119, 1122-23 (1993) (" ' Our tasks is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, the language must ordinarily be regarded as conclusive.") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 827 (1st Cir. 1990) (" ' The plain purpose of legislation . . . is to be determined in the first instance with reference to the plain language of the statute itself.' ") (quoting *Board of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986)); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter: for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

The Coal Act's assignment hierarchy plainly does not require assignments to successor companies. Section 9706(a) of the Coal Act provides for Combined Fund beneficiary assignments to "signatory operators" (or, if that operator is no

longer in business, to any related person which remains in business) based on the miner's work history and the collective-bargaining experience of the signatory-operator. A signatory operator, in turn, is defined as "a person which is or was a signatory to a coal wage agreement." Coal Act § 9701(c)(1). Neither the Coal Act's assignment hierarchy, nor its definition of "signatory operators," thus make any reference, express or otherwise, to successor companies.

That Congress omitted successor companies from the Coal's Act's assignment provision, moreover, cannot be attributed (as Eastern suggests) to mere legislative inadvertence or neglect. *See* Pl. SJ Mem. at 2, 19. Given that the Coal Act refers to "successors" in several other Coal Act sections, Congress' omission of successors from both the requirements of the assignment hierarchy and the definition of "signatory operators" was clearly intentional. *See, e.g., Estate of Bell v. Commissioner of Internal Revenue Service*, 928 F.2d 901, 904 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section but omits it from another."); *United States v. Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991); ("Not every congressional silence is pregnant . . . [i]n general, congressional consideration of an issue in one context, but no in another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed Congress acted intentionally and purposely in excluding the particular language."), *cert. denied*, 492 U.S. 924 (1989).

The Coal Act refers to successor companies in two separate provisions. First, reference is made to "successors in interest" in the definitional section for related persons. Coal Act § 9701 (c) (2)(A). Section 9701(c) (2)(A) provides that a company is deemed to be "related" to a signatory operator, for purposes of the Coal Act, when that company is either (i) a

member of the same controlled group of corporations as the signatory operator, or (ii) in a trade or business which is under the common control of the signatory operator, (iii) in a partnership or joint venture with the signatory operator. Of particular relevance here, the concluding clause of this section also provides that "[a] related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii)." *Id.*[11]

Subsection 9706(b)(2) contains the Coal Act's second reference to successor companies. Captioned "Reassignment upon purchase," this subsection provides that, should a company become a successor of an assigned **operator after the enactment date of the Coal Act,** the assigned operator may transfer any assigned Combined Fund beneficiaries to the successor. *Id.* The assigned operator transferring the assignments, however, remains the guarantor of benefits to its originally assigned beneficiaries. *Id.* (Because Eastern sold its coal operations to EACC long before the Coal Act's enactment in 1992, section 9706(b)(2) has no application to the Eastern-EACC sale).

Congress' omission of successor language from the requirements of the assignment hierarchy contained in 9706(a) thus stands in stark contrast to the two other subsections of the Coal Act which expressly address successorship issues. Inclusion of successors in those provisions relating to related persons (§ 9701(c) (2)(A)) and reassignments upon purchase (§ 9706(b)(2)) clearly establishes both a congressional awareness of successor company issues in the coal industry and a proficiency in expressly addressing such issues where deemed appropriate or necessary. Congress, therefore, must be presumed to have acted purposefully and intentionally when omitting successor language from the requirements of the Coal Act's assignment

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[11] As a general matter, the Coal Act directs the taking of a corporate snapshot as of July 20, 1992 to determine whether or not a company is related to a signatory operator. *Id.* at 9701(c)(2)(B).

hierarchy and definitional section for signatory operators. *See e.g. United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992), *cert. denied.* -- U.S. --, 114 S.Ct. 59 (1993).

Application of the plain language of the Coal Act to Eastern, in the final analysis, is also consistent with the overall framework of the Coal Act's assignment scheme. Far from leaving assigned operators without legal recourse should they have private contractual agreements with successors or other parties regarding responsibility for the payment of retiree health benefits, the Coal Act expressly provides for private indemnification actions irrespective of any beneficiary assignments made under the Act. Section 9706(f)(6) provides in full:

> Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Secretary.

While Eastern conveniently ignores this provision in its summary judgment memorandum, Eastern has already availed itself of this private right of action by filing a third-party complaint to this action, naming EACC and Peabody Holding Co., Inc. as third party defendants. *See Eastern Enterprises v. Peabody Holding Co., Inc.*, C.A. No. 93-12372-WF (filed Jan. 5, 1994). Thus, if Eastern's third-party...

* * * * *

(2) SSA Successor Policy Which Makes Assignments to Successor Companies Only When the Otherwise Assignable Signatory Operator (or Related Person) Is Out of Business Presents a Reasonable Interpretation of the Coal Act

While Eastern chides SSA for erecting an arbitrary "barrier" to successor assignments by implementing a policy

which requires that all otherwise assignable signatory operators (or related persons) be out of business before making assignments to successor companies, *see* Pl. SJ Mem. at 20-21, SSA's successor policy is both reasonable and consistent with the policies underlying the Coal Act.

As noted above, *see* discussion *supra* pp. 17-20, the Coal Act makes no express provision for assignments to successor companies. Thus, in conformance with the plain terms of the assignment hierarchy in § 9706(a) of the Coal Act. SSA first looks to in-business signatory operators (or their related persons) for Combined Fund beneficiary assignments. When no otherwise assignable signatories or related persons remain in business, the beneficiary, as a general matter, becomes an "orphan" beneficiary for whom all assigned operators bear a *pro rata* premium responsibility. Coal Act §§ 9704(d), 9706(a)(3). SSA's successor policy is intended to reduce the number of unassigned or "orphan" beneficiaries and thereby broaden the pool of assigned operators. In administering the Coal Act, SSA realized that some potentially inequitable results could arise in situations where, but for an assignment to a successor company, the beneficiary would be placed in the unassigned beneficiary pool. O'Connell Dec. ¶ 18.[16] Such potential inequities arise primarily because, while in-business signatory operators (such as Eastern) assigned responsibility for former employees may seek indemnification from a successor company by private action pursuant to § 9706(5), no such action could be maintained by (or on behalf of) unassigned beneficiaries. SSA therefore developed a

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[16] Such a situation is illustrated by the following example. Assume that both Company A and Company B are pre-1978 signatory operators, but neither of whom remained in business as of July 1992. Also assume that Company A has an active related company engaged in the candy business and Company B has an active successor company engaged in the coal business. Absent SSA's current successor policy, Company A's beneficiaries could be assigned to its related candy company, but Company B"s beneficiaries would have to be placed in the pool of unassigned beneficiaries. *See* O'Connell ¶ 18.

successor policy which looks to successor companies when all other otherwise assignable signatory operators or related persons are out of business on the grounds that, as between making an assignment to a successor company or placing a beneficiary in the unassigned beneficiary pool, Congress would have preferred successor assignments. *See* O'Connell Dec. ¶¶ 19.

SSA's successor policy, far from being arbitrary, not only remains true to the congressional policies underlying the Coal Act, but also serves the laudable purpose of reducing the overall number of orphan beneficiaries. SSA's succesor policy maintains a consistency with the overall structure of the Coal Act by treating successors similarly to related persons (a concept to which they are roughly equivalent) for purposes of making beneficiary assignments; neither related persons nor successors receive assignments; unless no former signatory employers remain in business. *See* Coal Act § 9706(a) O'Connell Dec. ¶ 16-17, 20, 22, *see also* 138 Cong. Rec. S17604 (daily ed. Oct 8, 1992) (describing Coal Act as "mak[ing] each . . . related person fully responsible for the signatroy operator's obligation should the signatory no longer be in business or otherwise fail to fulfill its obligations under the Act").

This policy, moreover, respects the congressional preference expressed in § 9706(a) for assignments to signatories and related persons by only looking to successor companies when no otherwise assignable entities remain in business. *See* 138 Cong. Rec. S17604 (noting that Act "intended to provide the greatest number of beneficiaries with health care benefits paid for by a company which remains in business and was the retiree's signatory employer, or is or was a person related to such signatory"); *see also* discussion infra pp. 33-34.

Finally, SSA's successors policy finds support in Congress' "overriding" concern for reducing the number of beneficiaries assigned to the pool of "orphan" beneficiaries. *See* 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) ("Allocation of beneficiaries to an entity or business which

continues business is the basic statutory intent. Thus, the Conference Agreement's overriding purpose is to find and designate a specific obligor for as many beneficiaries in the [UMWA] Plans as possible."); *see also id.* at 17605 ("In recognition to the fact that unassigned beneficiaries were not employed by the assigned operators at the time of their retirement, provisions are made to subsidize the assigned

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DISTRICT OF COLUMBIA

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MORGAN, LEWIS & BOCKUS LLP

AFFIDAVIT

Before me, the undersigned authority, appeared HAROLD P. COXSON, JR., who, being duly sworn according to law, deposed and stated as follows:

1. I am an attorney in Washington, D.C., who since 1974 has represented employers in connection with federal labor and employment law matters, including matters relating to the coal industry, the United Mine Workers of America ("UMWA"), and the UMWA Health and Retirement Funds.

2. In July 1992, I was acting as chairman of the Collective Bargaining Alliance ("CBA"), an informal group of businesses that was monitoring legislative action concerning the UMWA Funds.

3. On behalf of the CBA, I obtained a document entitled "Subtitle C--Health Care of Coal Miners" from sources on Capitol Hill, attached hereto as Exhibit 1. I have confirmed that this document was prepared by the Senate Legislative Counsel, abbreviated "S.L.C." on the face of the document. It was circulated to interested members of CBA on or around July 27, 1992.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

December 8, 1997 — /s/Harold P. Coxson, Jr.
Date — Harold P. Coxson, Jr.

Subscribed and sworn to before me this 8th day of December, 1997.

/s/ Corina Fox McBride, Notary Public District of Columbia

Subtitle C—Health Care of Coal Miners

SEC. 1941. SHORT TITLE.

This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992"

SEC. 1942. FINDINGS AND DECLARATION OF POLICY.

(a) FINDINGS.—The Congress finds that—

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest;

(2) an important element in the privately maintained benefit plans now experiencing financial difficulty has been the provision of health benefits for retirees of companies no longer contributing to the coal retiree health funds.;

(3) withdrawals of contributing employers from privately maintained benefit plans maintained under collective bargaining agreements and covering retirees in the coal industry have resulted in substantially increasing funding burdens for employers that continue to contribute to such plans, adversely affecting the stability of labor-management relations in the coal industry; and

(4) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) STATEMENT OF POLICY.—It is the policy of this subtitle—

(1) to remedy problems with the provision and funding of health care benefits with respect to the

beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

SEC. 1943. COAL INDUSTRY HEALTH BENEFITS PROGRAM.

(a) In General.—The internal Revenue Code of 1986 is amended by adding at the end the following new subtitle:

"Subtitle J—Coal Industry Health Benefits

"CHAPTER 99. COAL INDUSTRY HEALTH BENEFITS.

"CHAPTER 99—COAL INDUSTRY HEALTH BENEFITS.

"SUBTITLE A—Definitions of general applicability.
"SUBTITLE B—Combined benefit fund.
"SUBTITLE C—Health benefits of certain other miners.
"SUBTITLE D—Other provisions.

"Subchapter A—Definitions of General Applicability.

"Sec. 9701. Definitions of general applicability.

"SEC. 9701. DEFINITIONS OF GENERAL APPLICABILITY.

"(a) PLANS AND FUNDS.—For purposes of this chapter—

"(1) UMWA BENEFIT PLAN.—

"(A) IN GENERAL.—The term 'UMWA Benefit Plan' means a plan—

"(i) which is described in section 404(c), or a continuation thereof; and

"(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

"(B) 1950 UMWA BENEFIT PLAN.—The term '1950 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

"(C) 1974 UMWA BENEFIT PLAN.—The term '1974 UMWA Benefit Plan' means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

"(2) 1950 UMWA PENSION PLAN.—The term '1950 UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

"(3 1974 UMWA PENSION PLAN.—The term '1974' UMWA Pension Plan' means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

"(4) 1992 UMWA PENSION PLAN. —The term '1992 UMWA Benefit Plan' means the plan established under section 9713A.

"(5) COMBINED FUND.—The term 'Combined Fund' means the United Mine Workers of America Combined Benefit Fund established under section 9702.

"(b) AGREEMENTS.—For purposes of this section—

"(1) COAL WAGE AGREEMENT.—The term 'coal wage agreement' means—

"(A) the National Bituminous Coal Wage Agreement, or

"(B) any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

"(i) the provision of health benefits to retirees of such employer, eligibility for which is based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

"(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

"(2) SETTLORS.—The term 'settlors' means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the 'BCOA').

"(3) NATIONAL BITUMINOUS COAL WAGE AGREEMENT.—The term 'National Bituminous Coal Wage Agreement' means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

"(c) TERMS RELATING TO OPERATORS.—For purposes of this section—

"(1) SIGNATORY OPERATOR.—The term 'signatory operator' means—

"(A) a person which is or was a signatory to a coal wage agreement, or

"(B) in the event a person described in subparagraph (A) is no longer in business, any successor to such person.

"(2) 1988 AGREEMENT OPERATOR.—The term '1988 agreement operator' means—

"(A) a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement,

"(B) an employer in the coal industry which was a signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

"(C) an employer which, after 1987 and before the enactment date, made contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan [in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement].

"(3) LAST SIGNATORY OPERATOR.—The term 'last signatory operator' means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

"(4) ASSIGNED OPERATOR.—The term 'assigned operator' means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

"(5) RELATED PERSONS.—

"(A) IN GENERAL.—A person shall be considered to be a related person to a signatory operator if that person is—

"(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

"(ii) a trade or business which is under the same common control (as determined

under section 52(b)) as such signatory operator; or

["(iii) any other person who is identified by the Secretary of Health and Human Services as having an ownership or profit-sharing interest with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries.]

A related person shall also include a successor of any person described in clause (i), (ii), or (iii).

"(B) TIME FOR DETERMINATION.—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992 a signatory operator is no longer in business and has no successor, the relationships shall be determined as of the time immediately before such operator (or, if later, such successor) ceased to be in business.

"(6) OPERATORS OF DEPENDENT BENEFICIARIES.—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

"(7) BUSINESS.—For purposes of this chapter, a person shall be considered to be in business if such person or any related person conducts or derives revenue from any business activity, whether or not in the coal industry.

"(8) SUCCESSOR.—For purposes of this subsection, the term 'successor' has the meaning given such term when used in the National Labor Relations Act.

"(d) ENACTMENT DATE.—For purposes of this chapter, the term 'enactment date' means the date of the enactment of this chapter.

"Subchapter B—Combined Benefit Fund

"Part I—Establishment and Benefits
"Part II—Financing
"Part III—Enforcement
"Part IV—Other Provisions

"PART I—ESTABLISHMENT AND BENEFITS

"Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.

"Sec. 9703. Plan benefits.

"Sec. 9702. ESTABLISHMENT OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND.

"(a) ESTABLISHMENT. —

"(1) IN GENERAL.—As soon as practicable (but not later than 60 days after the enactment date), the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall create a plan to be known as the United Mine Workers of America Combined Benefit Fund. The trustees of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall be the trustees of the Combined Fund until the appointment of trustees under subsection (b).

["(1) IN GENERAL. —As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create

a plan to be known as the United Mine Workers of America Combined Benefit Fund.]

"(2) MERGER OF RETIREE BENEFIT PLANS.—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and all assets and liabilities of such plans shall become part of the Combined Fund.

"(3) TREATMENT FOR ERISA.—The Combined Fund shall be—

"(A) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

"(B) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

"(4) TAX TREATMENT.—The Combined Fund and any related trust shall be exempt from tax under this title.

"(b) BOARD OF TRUSTEES.—

"(1) IN GENERAL.—As soon as practicable after the assignment of eligible beneficiaries under section 9706, and in no event later than November 1, 1993, [For purposes of subsection (a),] a new private plan board of trustees for the combined Fund shall be appointed as follows:

"(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

"(B) one individual shall be designated by the three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

"(C) two individual designated by the United Mine Workers of America; and

"(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C).

"(2) SUCCESSOR TRUSTEES.—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. [Any person designating a trustee shall have the right to remove such trustee.]

"(3) SPECIAL RULES.—

"(A) BCOA.—If the BCOA ceases to exist, any trustee or successor under paragraph (1)(A) shall be appointed by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

["(B) FORMER SIGNATORIES.—The initial trustee under paragraph (1)(B) shall be appointed by the 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA. Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.]

"(c) PLAN YEAR.—The first plan year of the Combined Fund shall begin February 1, 1993 and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

"Sec. 9703. PLAN BENEFITS.

"(a) IN GENERAL.—Each eligible beneficiary of the Combined Fund shall receive—

"(1) health benefits described in subsection (b), and

"(2) in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

"(b) HEALTH BENEFITS.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiary by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. Except as provided in paragraph (2)(B), coverage under the managed care system shall be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

"(2) PLAN PAYMENT RATES.—

"(A) IN GENERAL.—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

"(i) vary as necessary to ensure that beneficiaries in different geographic areas have access to the same health benefits; and

"(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

"(B) REDUCTIONS.—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

"(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

"(ii) by the amount reserved for plan administration under subsection (d).

"(C) INCREASES.—The amount determined sunder subparagraph (A)(ii) shall be increased—

"(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

"(ii) by any carryover to the plan year from any preceding plan year which—

"(I) arises because payments form the Combined Fund for such preceding plan year were less than the limit under this paragraph, and

"(II) the trustees elect to use to pay benefits for the current plan year, and

"(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

["(3) COORDINATION WITH MEDICARE.—The level of coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992, shall be determined by taking into account any benefits or reimbursements provided under title XVIII of the Social Security Act.

"(4) QUALIFIED PROVIDERS.—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.]

"(5) EFFECTIVE DATE.—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

"(c) DEATH BENEFITS COVERAGE.—

"(1) IN GENERAL.—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, [on July 20, 1992.] Such coverage shall be provided on and after February 1, 1993.

"(2) TERMINATION OF COVERAGE.—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such plans from subsequently providing death benefits not described in paragraph (1).

"(d) RESERVES FOR ADMINISTRATION.—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

"(e) LIMITATION ON ENROLLMENT.—[Except as provided in section 9711(d) and 9712(c),] the Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

"(f) ELIGIBLE BENEFICIARY.—For purposes of this subchapter, the term 'eligible beneficiary' means an individual who—

"(1) is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the

1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan. or

"(2) on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

PART II—FINANCING

"Sec. 9704. Liability of assigned operators.
"Sec. 9705. Transfers.
"Sec. 9706. Assignment of eligible beneficiaries.

"SEC. 9704. LIABILITY OF ASSIGNED OPERAORS.

"(a) ANNUAL PREMIUMS.—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

"(1) the health benefit premium determined under subsection (b) for such plan year, plus

"(2) the death benefit premium determined under subsection (c) for such plan year, plus

"(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

"(b) HEALTH BENEFIT PREMIUM.—For purposes of this chapter—

"(1) IN GENERAL.—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

"(2) PER BENEFICIARY PREMIUM.—The Secretary of Health and Human Services shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of —

"(A) the amount determined by dividing—

"(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

"(ii) the number of such individuals, plus

"(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

"(c) DEATH BENEFIT PREMIUM.—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

"(d) UNASSIGNED BENEFICIARIES PREMIUM.—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

"(e) PREMIUM ACCOUNTS; ADJUSTMENTS.—

"(1) ACCOUNTS.—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

"(2) ALLOCATIONS.—

"(A) ADMINISTRATIVE EXPENSES. — Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

"(B) INTEREST.—Interest shall be allocated to the account established for health benefit premiums.

"(3) SHORTFALLS AND SURPLUSES.—

"(A) In general.—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to any surplus in the health benefit premium account which is attributable to—

"(i) amounts described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits) for the plan year or any preceding plan year, or

"(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

"(f) APPLICABLE PERCENTAGE.—For purposes of the section—

"(1) IN GENERAL.—The term 'applicable percentage' means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

"(2) ANNUAL ADJUSTMENTS.—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

"(A) Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

"(B) The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators who ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

"(g) PAYMENT OF PREMIUMS.—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, except as provided in subsection (i), the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

"(h) INFORMATION.—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Secretary of Health and Human Services information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may require to compute any premium under this section.

"(i) TRANSITION RULES.—

"(1) 1988 AGREEMENT OPERATORS.—

"(A) 1ST YEAR COSTS.—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreements operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year.

"(B) DEFICITS FROM MERGED PLANS.—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

"(C) FAILURE.—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

"(D) PREMIUM REDUCTIONS.—

"(i) 1ST YEAR PAYMENTS.—In the case of a 1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount of premiums

under subsection (a) which are paid by assigned operators other than 1988 agreement operators for the plan year beginning February 1, 1993, and which are allocated to such operator under subparagraph (E).

"(ii) DEFICIT PAYMENTS.—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of litigation based on the 'evergreen clause' found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan and which are allocated to such operator under subparagraph (E).

(iii) PLAN YEARS.—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

"(E) ALLOCATIONS OF CONTRIBUTIONS AND REFUNDS.—Contributions under subparagraphs (A) and (B), and premium reductions under subparagraph (D), shall be made ratably on the basis of aggregate contributions made under the applicable 1988 coal wage agreements.

"(2) 1ST PLAN YEAR.—In the case of the plan year of the Combined Fund beginning February 1, 1993—

"(A) the premium under subsection (a)(1) shall be 67 percent of the premium without regard to this paragraph, and

"(B) the premiums under subsection (a) shall be paid as provided in subsection (g).

"SEC. 9705. TRANSFERS.

"(a) TRANSFER OF ASSETS FROM 1950 UMWA PENSION PLAN. —

"(1) IN GENERAL.—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

"(A) $70,000,000 on February 1, 1993,

"(B) $70,000,000 on October 1, 1993, and

"(C) $70,000,000 on October 1, 1994.

"(2) RESERVATION.—Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

"(3) USE OF FUNDS.—Amounts transferred to the Combined Fund under paragraph (1) shall—

"(A) in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

"(B) in the case of any other such transfer, be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators under section 9704(i)(1)(B).

"(4) TAX TREATMENT; VALIDITY OF TRANSFER. —

"(A) NO DEDUCTION.—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

"(B) OTHER TAX PROVISIONS.—Any transfer pursuant to paragraph (1) —

"(i) shall not be treated as an employer reversion from a qualified plan for purposes of section 4980, and

"(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA pension Plan.

"(5) TREATMENT OF TRANSfer.—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability, taxes, fines or penalties of any kind whatsoever.

"(b) TRANSFERS FROM ABANDONED MINE RECLAMATION FUND. —

"(1) IN GENERAL.—The Combined Fund shall include any amount transferred to the Fund under section

402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S. C. 1232(h)).

"(2) USE OF FUNDS.—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

"SEC. 9706. ASSIGNMENT OF ELIGIBLE BENEFICIARIES

"(a) IN GENERAL.—For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which is in business in the following order:

"(1) First, to the signatory operator which—

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

"(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which —

"(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

"(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

"(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator during all periods before 1978.

"(b) RULES RELATING TO EMPLOYMENT.—For purposes of subsection (a) —

"(1) RELATED PERSON.—Any employment of a coal industry retiree in the coal industry by a related person with respect to a signatory operator shall be treated as employment by the operator.

"(2) CERTAIN EMPLOYMENT DISREGARDED.—

Employment with—

"(A) a person no longer in business, or

"(B) a person who has never been a signatory to a coal wage agreement,

shall not be taken into account.

"(c) IDENTIFICATION OF ELIGIBLE BENEFICIARIES.—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Secretary of Health and Human Services a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

"(d) COOPERATION BY OTHER AGENCIES AND PERSONS.—

"(1) IN GENERAL.—The head of any department, agency, or instrumentality of the United States shall cooperate fully and promptly with the Secretary of Health and Human Services in providing information which will enable the Secretary to carry out his responsibilities under this section.

"(2) PROVIDING OF INFORMATION. —

"(A) IN GENERAL.—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a request from the Secretary of Health and Human Services in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Secretary shall be advised whether the search disclosed the information and, if so, such information shall be promptly transmitted to the Secretary, except that if the disclosure of any requested information would contravene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Secretary shall be so advised.

"(B) LIMITATION.—Any information provided under subparagraph (A) shall be limited to information necessary for the Secretary to carry out his duties under this section.

"(3) TRUSTEES.—The trustees of the Combined Fund, the 1950 UMWA Benefit Plan, and the 1974 UMWA Benefit Plan shall fully and promptly cooperate with the Secretary in furnishing, or assisting the Secretary to obtain, any information the Secretary needs to carry out the Secretary's responsibilities under this section.

"(e) NOTICE BY SECRETARY. —

"(1) NOTICE TO FUND.—The Secretary of Health and Human Services shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names

and social security account numbers of eligible beneficiaries with respect to whom he is identified.

"(2) OTHER NOTICE.—The Secretary of Health and Human Services shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section [and a brief explanation of the basis for such assignments].

"(f) RECONSIDERATION BY SECRETARY. —

"(1) IN GENERAL.—Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Secretary of Health and Human Services detailed information as to the basis of the assignment.

"(2) REVIEW.—An assigned operator may, within 15 days of receipt of the information under paragraph (1), request review of the assignment. The Secretary of Health and Human Services shall conduct such review if the Secretary finds the operator provided evidence with the request constituting a prima facie case of error.

"(3) RESULTS OF REVIEW.—

"(A) ERROR.—If the Secretary of Health and Human Services determines under a review under paragraph (2) that an assignment was in error—

"(i) the Secretary shall notify the assigned operator and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review the beneficiary's record for reassignment under subsection (a).

"(B) NO ERROR. —If the Secretary of Health and Human Services determines under a review conducted under paragraph (2) that no error occurred, the Secretary shall notify the assigned operator.

"(4) APPEALS. —

"(A) FINALITY.—Any determination by the Secretary of Health and Human Services under paragraph (2) or (3) shall be final.

"(B) COURT ACTION.—If a court overturns a determination by the Secretary of Health and Human Services under paragraph (3)(B) —

"(i) the trustees of the Combined Fund shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

"(ii) the Secretary shall review beneficiary's record for reassignment under subsection (a).

"(5) PAYMENT PENDING REVIEW.—An assigned operator shall pay the premiums under section 9704 pending review by the Secretary of Health and Human Services or by a court under this subsection.

"(g) CONFIDENTIALITY OF INFORMATION.—Any person to which information is provided by the Secretary of Health and Human Services under this section shall not disclose such information except to the extent necessary for purposes of this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

"PART III—ENFORCEMENT

"Sec. 9707. Failure to pay premium

"SEC. 9707. FAILURE TO PAY PREMIUM.

"(a) GENERAL RULE.—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

"(b) AMOUNT OF PENALTY.—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

"(c) NONCOMPLIANCE PERIOD.—For purposes of this section, the term 'noncompliance period' means, with respect to any failure to pay any premium or installment thereof, the period—

"(1) beginning on the due date for such premium or installment, and

"(2) ending on the date of payment of such premium or installment.

"(d) LIMITATIONS ON AMOUNT OF PENALTY. —

"(1) IN GENERAL.—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

"(2) CORRECTIONS. —No penalty shall be imposed by subsection (a) on any failure if—

"(A) such failure was due to reasonable cause and not to willful neglect, and

"(B) such failure is corrected during the 30-day period beginning on the 1st date that any of the

persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

"(3) WAIVER.—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

"(e) LIABILITY FOR PENALTY.—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a),

"(f) TREATMENT.—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

"PART IV—OTHER PROVISIONS

"Sec. 9708. Effect on pending claims.

"SEC. 9708. EFFECT ON PENDING CLAIMS.

"All liability for contributions that become due to the Combined Fund on and after February 1, 1993, shall be determined under this chapter. However, nothing in this chapter is intended to have any effect on any claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan before February 1, 1993, including claims based on the 'evergreen' clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan before February 1, 1993.

1992 FUND

[TO BE SUPPLIED]

(b) AMENDMENTS TO SURFACE MINING ACT. —

(1) EXTENSION OF FEE PROGRAM.—Section 402(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995" and inserting "September 30, 2005".

[(1) EXTENSION OF FEE PROGRAM.—Section 402(b) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(b)) is amended by striking "September 30, 1995 and inserting "with the earlier of September 30, 2005, or the fiscal year following the first fiscal year for which there are no unassigned beneficiaries (within the meaning of section 9704(d) of the Internal Revenue Code of 1986) within the United Mine Workers of America Consolidated Benefit Fund established under section 9702 of such Code".]

(2) TRANSFER TO FUND.—Section 402 of such Act (30 U.S.C. 1232) is amended by adding at the end the following new subsection:

"(h) TRANSFER OF FUNDS TO COMBINED FUND. —

(1) In the case of any fiscal year beginning on or after October 1, 1995, with respect to which fees are required to be paid under this section, the Secretary shall, as of the beginning of such fiscal year and before any allocation under subsection (g), make the transfer provided in paragraph (2).

"(2) The Secretary shall transfer from the fund to the United Mine Workers of America Combined Benefit Fund established under section 9702 of the Internal Revenue Code of 1986 for any fiscal year an amount equal to the sum of—

"(A) the amount of the interest which the Secretary estimates will be earned and paid to the Fund during the fiscal year, plus

"(B) the amount by which the amount described in subparagraph (A) is less than $70,000,000.

"(3)(A) The aggregate amount which may be transferred under paragraph (2) for any fiscal year shall not exceed the amount of expenditures which the trustees of the Combined Fund estimate will be debited against the unassigned beneficiaries premium account under section 9704(e) of the Internal Revenue Code of 1986 for the fiscal year of the Combined Fund in which the transfer is made.

"(B) The aggregate amount which may be transferred under paragraph (2)(B) for all fiscal years shall not exceed an amount equivalent to all interest earned and paid to the fund before October 1, 1985.

"(4) If, for any fiscal year, the amount transferred is more or less than the amount required to be transferred, the Secretary shall appropriately adjust the amount transferred for the next fiscal year."

[(3) STUDY.—If, as of the close of any fiscal year, the Secretary of Health and Human Services determines that there are no unassigned beneficiaries in the United Mine Workers of America Combined Benefit Fund, the Secretary shall conduct a study and report to the Congress by the close of the following fiscal year as to

(A) the possibility of any future unassigned beneficiaries coming into the Combined Fund, and

(B) the necessity for continuing the fees under section 402(b) of the Surface Mining Control and Reclamation Act of 1977, including consideration of the effect of the Clean Air Act on the need for continuing such fees.]

(4) CONFORMING AMENDMENTS.—(A) Section 401(c) of such Act (30 U.S.C. 1231(c)) is amended by striking "and" at the end of paragraph (11), by redesignating paragraph (12) as paragraph (13), and by adding after paragraph (11) the following new paragraph:

"(12) for the purpose described in section 402(h); and",

(B) Section 402(g)(1) of such Act (30 U.S.C. 1232(g) is amended by striking "Moneys" and inserting "Except as provided in subsection (h), moneys"

102D CONGRESS 2d SESSION | HOUSE OF REPRESENTATIVES | REPORT 102-1018

ENERGY POLICY ACT OF 1992

CONFERENCE REPORT

TO ACCOMPANY

H.R. 776

OCTOBER 5, 1992—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
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ENERGY POLICY ACT OF 1992

OCTOBER 5, 1992—Ordered to be printed

Mr. DINGELL, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 776]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 776), to provide for improved energy efficiency, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE: TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Energy Policy Act of 1992".

(b) TABLE OF CONTENTS.—

TITLE I—ENERGY EFFICIENCY

Subtitle A—Buildings

Sec. 101. Building energy efficiency standards.
Sec. 102. Residential energy efficiency ratings.

Sec.103 Energy efficient lighting and building centers
Sec. 104 Manufactured housing energy efficiency.
Sec. 105 Energy efficient mortgages.
Sec. 106 Energy efficient mortgages pilot program.

Subtitle B—Utilities

Sec. 111 Encouragement of investments in conservation and energy efficiency by electric utilities.
Sec. 112 Energy efficiency grants to State regulatory authorities.
Sec. 113 Tennessee Valley Authority least-cost planning program.
Sec. 114 Amendment of Hoover Power Plant Act.

* * * * *

20.2056(b)-5(c)). Finding this regulation invalid, courts have held that the term "specific portion" includes a fixed dollar amount. See *Northeastern Pennsylvania National Bank & Trust Co. v. United States*, 387 U.S. 213 (1967); *Estate of Alexander v. Commissioner*, 82 T.C. 34 (1984), *aff'd*, No. 8401600 (4th Cir. April 3, 1985). Under the court holdings, appreciation in certain marital deduction property may be includible in neither spouse's estate.

House bill

No provision in H.R. 776. (However, H.R. 11 as passed by the House contains the same provision as included in the conference agreement described below).

Senate amendment

No provision in H.R. 776. (However, H.R. 11 as amended by the Senate contains the same provision as included in the conference agreement described below.

Conference agreement

The conference agreement provides that, for purposes of the marital deduction, a "specific portion" only includes a portion determined on a fractional or percentage basis. Thus,

a trust does not qualify under the exceptions to the terminable interest rule unless the required income interest and general power of appointment are expressed as a fraction or a percentage of the property.

It is intended that no inference be drawn from the provision with respect to the definition of "specific portion" under present law. The conference agreement does not generally affect the marital deduction allowed for a pecuniary formula marital deduction bequest. See, e.g., Rev. Proc. 64-19, 1964-1 C.B. 682.

Effective date.—The provision generally applies to gifts made, and decedents dying, after date of enactment. The provision does not apply to a transfer under a will or revocable trust executed before the date of enactment if either (1) on that date the decedent was under a mental disability to change the disposition of his property and did not regain his competence to dispose of such property before the date of death, or (2) the decedent dies within three years after the date of enactment. The provision applies, however, if the will or trust is amended after the date of enactment in any respect that increases the amount of the transfer qualifying for the marital deduction or alters the terms by which the interest passes.

C. Health Benefits for Retired Coal Miners

Present Law

The United Mine Workers of America (UMWA) health and retirement funds were established in 1974 pursuant to an agreement between the UMWA and the Bituminous Coal Operator's Association (BCOA) to provide pension and health benefits to retired coal miners and their dependents. The funds have been maintained for this purpose through a series of collective bargaining agreements. The funds created in 1974 were a restructuring of the original benefit fund, which was established in 1946.

The funds consist of four different plans, each of which is funded through a separate trust. The 1950 Pension Plan provides retirement benefits to miners who retired on or before December 31, 1975, and their beneficiaries. The 1950 Benefit Plan provides health benefits for retired mine workers who receive pensions from the 1950 Pension Plan and their dependents. The 1974 Pension Plan provides retirement benefits to miners who retire after December 31, 1975, and their beneficiaries. The 1974 Benefit Plan provides health benefits to miners who retire after December 31, 1975. It also provides health benefits to miners whose last employers are no longer in business or, in some cases, no longer signatory to the applicable bargaining agreement. These miners are generally referred to as "orphan" retirees.

The Surface Mining Control and Reclamation Act of 1977, as amended, imposes a reclamation fee on coal mining operators, payable quarterly to the Secretary of the Interior for deposit in the Abandoned Mine Reclamation Fund (the AML Fund). The fee generally is the lesser of (1) 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mine or (2) 10 percent of the value of the coal at the mine. The fee for lignite is the lesser of 2 percent of the value of the coal at the mine or 10 cents per ton. The reclamation fee is scheduled to expire after September 30, 1195.

House bill

The House bill extends the abandoned mine reclamation fee through September 30, 2010.

Effective Date—Date of enactment.

Senate amendment

The Senate amendment provides that the 1950 Benefit Plan and the 1974 Benefit Plan are to be merged into a new UMWA Combined Benefit Fund ("Combined Fund") to provide health and death benefits for eligible retirees and their dependents. The Combined Fund is to be financed primarily

by health benefit premiums, death benefit premiums, and unassigned beneficiaries premiums imposed on assigned operators. The Combined Fund will receive additional funding from transfers from the 1950 Pension Plan and the AML Fund. The amendment also creates a 1992 Benefit Fund to provide benefits for persons not eligible under the Combined Fund.

The Senate amendment extends the abandoned mine reclamation fund fee through September 20, 2004.

Conference agreement

The conference agreement follows the Senate amendment.

D. Trade Provision: Anticircumvention of Antidumping and Countervailing Duty Orders

Present Law

The Omnibus Trade and Competiveness Act of 1988 expanded antidumping and countervailing duty law to authorize the Department of Commerce to take action to address attempts to circum

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LEGISLATIVE HISTORY

HOUSE REPORT NO. 102-474(I)

House Conference Report No. 102-1018. Oct. 5. 1992

[To accompany H.R. 776]

No Senate Report was submitted with this legislation. The House Report (Parts I-IX (this page, 2064, 2182, 2201, 2210, 2232, 2271, 2282, 2422)) is set out below and the House Conference Report (page 2472) and the President's Signing Statement (page 2534-1) follow.

HOUSE REPORT NO. 102-474(I)

[page 1]

The committee on Energy and Commerce, to whom was referred the bill (H.R. 776) to provide for improved energy efficiency, having considered the same report favorable thereon with an amendment and recommend that the bill as amended do pass.

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